CHAPTER 03

MAJOR LEGAL SYSTEMS OF THE WORLD[1]

3.1 INTRODUCTION

The legal system is concerned with the way in which laws are enacted and administered. It also deals with the mode of dispute resolution. There are many different legal systems adopted around the globe. Legal system varies from one country to another and is largely shaped by the unique history of a particular country. Generally, the most widespread legal systems in the world are the civil law system, the common law system and the religious law. There can also be a regional legal system, for example, the European Union has its own legal system and it forms an integral part of the legal systems of Member States. At the international level, the international law is of significant importance. In some countries such as Malaysia, the legal system is composed of the common law system and the Islamic law system. The application of the common law system in Malaysia was a direct result of the British administration of the Malay Peninsular and the Borneo states for more than 150 years which had left greater impact upon the law of the country. Further, art. 121(1A) of the Federal Constitution also provides for a dual justice system in Malaysia. Having said the above, this chapter discusses the major legal systems across the world, i.e., civil law system, common law system, and Islamic legal system in conjunction with the emergence of mixed legal systems.[2]

1 This chapter is contributed by Ashgar Ali Ali Mohamed and Muhamad Hassan Ahmad.

2 The systems are further discussed in greater details in this book under various chapters.

3.2 CIVIL LAW SYSTEM

The civil law system or sometimes known as the 'Continental European law' is used in many countries in Europe, Asia, Africa and South America. It is hard to trace the origin of the civil law system and it has been in practice since time immemorial. The most credible example of civil law recorded in the history was the Code of Hammurabi which approximately dates back to 1795-1750 BC. It was further developed during the Roman Empire and evolved into a series of codes across Europe such as the Civil Code of Napoleon, the German Civil Code and the Italian Civil Code.[3] The obvious feature in the civil law system is that its 'core principles are codified into a referable system which serves as the primary source of law.' The legal rules are codified in the form of statutes enacted by a competent legislative body and it forms the primary source of law. These statutes basically deal with all possible matters which could be brought before a court, the applicable procedures for proceedings and the appropriate punishment for offenses.

Generally, under this system a solution to a particular case is based on the provisions in a code or statute. For example, the French legal system is contained in the *Code Civil*, or *Code Napoléon*, (Civil Code or Napoleonic Code) which was drawn up in 1804. The said Code laid down the rights and obligations of citizens, the laws of property, contract and inheritance, among others. The other codes enforced in France are the *Code Pénal*, or Penal Code, which defines criminal law and the Code Fiscal (Fiscal Code). Statutory instruments (*décrets, ordonnances*) are passed by the two houses of the French Parliament, the National Assembly and the Senate, and it becomes law when it is signed by the minister and published in the *Journal Officiel* or Official Journal.

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3 See also Emilia Justyna Powell and Sara McLaughlin Mitchell, 'The International Court of Justice and the World's Three Legal Systems' The Journal of Politics, (2007) vol 69(2): 397-415, at p. 398.

Judges in the civil law system have an active position in the trial. They are more than just arbitrators. They lead the hearing and this includes establishing the facts of the case and applying the relevant provisions of the applicable statute to the case. It is the court's duty to determine the truth and the court is not bound by parties' factual admissions or stipulations. For example, the French Code of Criminal Procedure confers 'upon the presiding judge discretionary authority to take, 'on his honor and conscience,' all measures he or she deems useful to discover the truth.[4] When the formal document of accusation has been filed by the prosecutor, the presiding judge reviews the evidence gathered before the trial. In addition to witnesses suggested by both parties, he or she can have any other witnesses called, can appoint experts and have physical evidence produced. It is the presiding judge who interrogates the defendant and all witnesses. Members of the court may ask additional questions[5] whereas the parties are limited to suggesting additional questions but may not themselves examine witnesses.'[6] Apart from the above, cases are generally decided using the provisions of the statute on a case-by-case basis, without reference to judicial decisions. Even though inferior courts are not bound by the decisions of the higher courts, the higher court's decision nevertheless still have a certain influence on the inferior courts.[7]

3.3 COMMON LAW SYSTEM

Compared to the civil law system, the common law system has the most recent origin, as it emerged after the Norman Conquest in 1066 AD. The Norman invaders introduced the fundamental components of the common law system in the absence of written law.

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4 Code of Criminal Procedure (France), art. 310.

5 *Ibid*, art. 311.

6 *Ibid*, art. 312. See Criminal Procedure: Comparative Aspects – Adjudication – Trial, Court, Evidence, and Sentence – at http://law.jrank.org/pages/901/Criminal-Procedure-Comparative-Aspects Adjudication.html#ixzz3AYC7aqHX

7 See 'The French legal system' at http://www.justice.gouv.fr/art_ pix/french_legal_ system.pdf

This system was maintained by English kings in resistance to the influence of continental law, i.e., the civil law.[8] The common law system emphasised on judicial precedent or *stare decisis*[9] which is derived from the decisions of the courts. It is sometimes called 'case law'. This doctrine dictates that in the hierarchical system of courts, it is necessary for each lower tier to accept loyally the decisions of the higher tiers.

Apart from judicial precedent, the institution of prosecution is the sole prerogative of the Attorney-General. In *Teh Cheng Poh v. PP*,[10] Lord Diplock stated: "Under the common law system of administration of criminal justice a prosecuting authority has a discretion whether to institute proceedings at all and, if so, with what offence to charge the accused. Such a discretion is conferred upon the Attorney-General of Malaysia by art. 145(3) of the Constitution.[11] There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another." The Attorney-General's discretion as above is unfettered and cannot be subject to judicial review in the ordinary court of law. In *Long bin Samat & Ors v. Public Prosecutor*,[12] Suffian LP stated: "Anyone who is dissatisfied with the Attorney-General's decision not to

8 See also Emilia Justyna Powell and Sara McLaughlin Mitchell, 'The International Court of Justice and the World's Three Legal Systems' (2007) vol 69(2) of The Journal of Politics, 397, at p. 398.

9 For *stare decisis*, see further Chapter 12 below.

10 [1978] 1 LNS 202.

11 The abovementioned article provides: "The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Muslim court, a native court or a court-martial."

12 [1974] 1 LNS 80; [1974] 2 MLJ 152, 158.

prosecute, or not to go on with a prosecution or his decision to prefer a charge for a less serious offence when there is evidence of a more serious offence which should be tried in a higher court, should seek his remedy elsewhere, but not in the courts."

Further, it is the duty of the prosecution to make out a case against the accused by adducing evidence to establish the charge levelled against him. In *Balachandran v. Public Prosecutor*,[13] the Federal Court stated *inter alia*, that in order to make a finding, the court must, at the close of the prosecution's case, undertake a positive evaluation of the credibility and reliability of all the evidence adduced to determine whether all the elements of the offence have been established. If the evidence is unrebutted, and the accused remains silent, he must be convicted. Therefore, the test to be applied at the end of the prosecution's case is whether there is sufficient evidence to convict the accused if he chooses to remain in silent, which if answered in the affirmative means that a *prima facie* case has been made out.

The parties, and not the judge, have the primary responsibility of conducting the proceedings by defining the issues in dispute and advancing the evidence to substantiate their claims. Certain types of evidence are generally inadmissible for the reasons that their prejudicial effect outweighs their probative value or because they give rise to side issues that would complicate the trial, distract the trial of fact and unnecessarily cause delay. For example, evidence relating to similar facts, character, hearsay and opinion is generally excluded for these reasons.

Further, the judge is, and must remain, an impartial umpire. "He cannot do anything which gives the impression that he has descended into the arena of the conflict – trial must be one that is fair, impartial and not leaning to either side. Counsel and the judge have their respective roles to play. Basically, it is the role of the judge to hold the balance between the contending parties and to decide the case on the evidence brought by both sides and in accordance with the rules of the particular court and the procedure and practice chosen by the parties in accordance

13 [2005] 1 CLJ 85.

with those rules."[14] The primary function of a judge in the common law system is to interpret the law and to give effect to the purpose or object of the laws enacted by the legislature.[15] "It is never the duty of the court to order any laws to be made. An order of such nature amounts to a usurpation of the function of the legislature or any such bodies."[16] Further, a judge cannot overrule a statute or even amend, modify, or alter it. They can only make law through interpretation of statutory laws and customary rules.

The role of a judge in the common law system was aptly noted by Lord Denning MR in *Jones v. National Coal Board*:[17] "A judge's part ... is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevances and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the role of an advocate; and the change does not become him well."

Having said the above, it is noted that the common law system spread throughout the British Empire and has been influencing the legal system of many states in various continents. It is currently being practised in Australia, Canada, India, Ireland, Malaysia, Nigeria, Pakistan, South Africa, the UK and the US, to name but a few. Being formerly under the British administration, Malaysia could easily be classified as a member of the common law legal system.

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14 Per Justice Philip Nnaemeka-Agu in 'The Role of Lawyers in the Protection and Advancement of Human Rights' [1993] 1 CLJ iv.

15 See *United Malacca Bhd v. Pentadbir Tanah Daerah Alor Gajah and other applications* [2002] 4 CLJ 177, FC; *Chor Phaik Har v. Farlim Properties Sdn Bhd* [1994] 4 CLJ 285, FC.

16 Per Rohana Yusof J in *Teo Hoon Seong & Ors v. Suruhanjaya Pilihan Raya* [2012] MLJU 183. See also *Muthukamaru @ Muthukumaru A/L Veeriah v. Pemungut Duti Harta Pesaka* [1998] MLJU 327 where it was stated: "It cannot impose its own will against the will of the legislature, no matter how much the party wants the court to do so."

17 [1957] 2 All ER 155.

3.4 ISLAMIC LEGAL SYSTEM

Religious laws such as *Dharma* in Hinduism, *Halakha* in Judaism, Canon Law in some sects of Christianity, and the Syariah in Islam are developed by employing various methodologies from divine sources. The Syariah, which includes both faith and practice, was introduced with the advent of Islam in the Arabian Peninsula in the seventh century.[18] It is intimately linked to religious tenets. It embraces the whole sphere of human life, providing the basic moral and legal framework on a wide range of transactions such as *Ibadah* (worship), *Muamalat* (transactions), *Ahwal Shakhsiyyah* (family matters) and *Jinayat* (crimes and punishments).[19]

The practical legal rules contained in the Syariah are derived from the Quran and the *Sunnah*. The Quran contains a great number of moral precepts of general nature such as retribution, fairness in commercial dealings, and compassion for the weaker members of society, to mention but a few. Further, the traditions of the Prophet Muhammad (s.a.w.) supplement and expand the general precepts of the Quran. During the lifetime of the Prophet Muhammad (s.a.w.) only the Quran was recognised as binding but after his demise, the loyal companions and the respected Caliphs of Islam codified the practice and submissions of the Prophet (s.a.w.) into what is now known as the *Sunnah*. The other sources of Syariah are the consensus of opinion (*Ijma*), judicial reasoning (*Qiyas*), *Istihsan* (derivation), *Istislah* (public interest), and sources as to customs and usage. Hence, the condified Syariah instruments of a Muslim state must be in conformity with the divine laws, namely the Quran and the *Sunnah*.

18 See also Gamal Mourisi Badr, 'Islamic Law: Its Relation to Other Legal Systems', (1978) vol 26(2) American Journal of Comparative Law 187.

19 See Murad, Khurram, 'Shari'ah - The Way to God', Retrieved 21 January 2012 from http://www.globalwebpost.com/farooqm/study_res/islam/fiqh/farooq_shariah.html

In the event of a conflict between the Syariah instruments of a State and the provisions of *hukum syarak* (Islamic law), the latter shall prevail. This is clearly provided, for example, in s. 230(1) of the Syariah Criminal Procedure (Federal Territories) Act 1997: 'Any provisions or interpretation of the provisions under this Act which is inconsistent with the *Hukum Syarak* shall, to the extent of the inconsistency, be void'. A similar provision is also contained in the Syariah Court Evidence (Federal Territories) Act 1997, s. 130, and the Syariah Court Civil Procedure (Federal Territories) Act 1998, s. 245.[20] Hence, an in-depth knowledge on the objectives (*maqasid*) of the Syariah as well as the knowledge of the various branches of fiqh is a pre-requisite for a person intending to be a *syarie* judge or a *syarie* lawyer.

Apart from the above, the parties and their representatives in a dispute are charged with the obligation of upholding justice absolutely. Success in a trial means success in upholding justice and rendering it to the rightful person. There are many verses of the Quran where Allah (s.w.t.) has ordered man to be just and trustworthy, among other things. The following are some of the verses from the Quran.

> Allah doth command you to render back your trusts to those to whom they are due, and–when ye judge between man and man that ye judge with justice. Verily how excellent is the teaching which He giveth you! For Allah is He who heareth and seeth all things.[21]
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> If thou judge, judge in equity between them; for Allah loveth those who judge in equity.[22]
>
> Allah commands justice, the doing of good and liberality to kith and kin and He forbids all shameful deeds and injustice and rebellion. He instructs you that ye may receive admonition.[23]

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20 In *Hamzah b Zainuddin v. Noraini bte Abdul Rashid* [2005] 3 Shariah Law Reports 94, the Perak Syariah Appeal Court held that s. 144 of the Syariah Civil Procedure Enactment 1996 (Perak) was contrary to *hukum syarak* and therefore pursuant to s. 245 of the Enactment, *hukum syarak* (Syariah ruling) prevailed.

21 Quran, *An-Nisa* (4): 58.

22 Quran, *Al-Maedah* (5): 42.

23 Quran, *Al-Nahl* (16): 90.

> O David! We did indeed make thee a vicegerent on earth: so judge thou between men in truth (and justice). Nor follow thou the lusts (of thy heart) for they will mislead thee from the Path of Allah.[24]
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> We sent aforetime our messengers with clear signs and sent down with them the Book and the Balance (of Right and Wrong), so that men may stand forth injustice.[25]
>
> And judge thou between them by what Allah hath revealed, and follow not their vain desires but beware of them lest they beguile thee from any of that (teaching) which Allah hath sent down to thee.[26]
>
> We have sent down to thee the Book in truth that thou might judge between men as guided by Allah, so be not (used) as an advocate by those who betray their trust.[27]
>
> O ye who believe! Stand out firmly for Allah as witnesses to fair dealing, and let not the hatred of others to you make you swerve to wrong and depart from justice. Be just: that is next to Piety and fear Allah. For Allah is well acquainted with all that ye do.[28]

Therefore, it is the duty of a *syarie* lawyer to assist the judge in arriving at a just and fair decision even if it runs contrary to their client's interest. The Quran further provides: "O ye who believe! Stand out firmly for justice, as witnesses to Allah even against yourselves or your parents or your kin and – whether it be (against) rich or poor. For Allah can best protect both. Follow not the lusts (of your hearts) lest ye swerve, and if ye distort (justice) or decline to do justice, verily Allah is well-acquainted with all that ye do."[29] Witnesses summoned to court shall appear as witnesses for Allah (s.w.t.) and not for the litigants. Allah (s.w.t.) says: "The witnesses should not refuse when they are called on

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24 Quran, *Sad* (38): 26.

25 Quran, *Al-Had* (57): 25.

26 Quran, *Al-Maedah* (5): 49.

27 Quran, *An-Nisa'* (4): 105.

28 Quran, *Al-Maedah* (5): 8.

29 Quran, *An-Nisa'* (4): 135.

(for evidence)".[30] Again, "Conceal not evidence, for whoever conceals it his heart is tainted with sin and Allah knoweth all that ye do".[31] The person who possesses information and evidence must co-operate by giving testimony or evidence. If they refuse to do so, it is tantamount to an act of disobedience against Allah (s.w.t.) and they have therefore committed a sin.

There may be instances where the lawyer's eloquent argument may persuade the judge to make a finding in his/her favour although he knows that righteousness was not on his/her side. In such a situation, the lawyer might have only managed to do an evil act and thus, incurred sin. A *hadith* narrated by Ummu Salama, the wife of the Prophet (s.a.w.), where the Prophet (s.a.w.) said: "I am only a human being, and you people have disputes. Maybe someone amongst you can present his case in a more eloquent and convincing manner than the other, and I give my judgment in his favour according to what I hear. Beware! If ever I give (by error) somebody something of his brother's right then he should not take it as I have only, given him a piece of Fire."[32] As from the above *hadith*, Islam insists that Muslims must observe good ethics, with clear conscience and piousness in their dealings and this includes conducting their cases in court.

Apart from the above, to Muslims there is a sense of accountability to Allah, in that Allah (s.w.t.) sees and knows all things. A person may hide himself from the whole world or deceive others or can flee from the clutches of the law but he is not able to do the above from Allah (s.w.t.). Thus, whatever man does in this life he cannot escape from the fact that one day he will die and be compelled to account for his actions.

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30 Quran, *Al-Baqarah* (2): 282.

31 Quran, *Al-Baqarah* (2): 283.

32 *Sahih al-Bukhari*, vol. 9, *hadith* No 97. In another narration, Ummu Salama narrated that Allah's Apostle heard some people quarreling at the door of his dwelling. He came out and said, "I am only a human being, and opponents come to me (to settle their problems); maybe someone amongst you can present his case more eloquently than the other, whereby I may consider him true and give a verdict in his favour. So, if I give the right of a Muslim to another by mistake, then it is really a portion of (Hell) Fire, he has the option to take or give up (before the day of resurrection)" (*Sahih al-Bukhari*, vol. 3, *hadith* No. 638).

Every good or ill that a person does is recorded. When a man dies, a register of his deeds from the early period of his life to the end of his days will be shown to him.[33] The concept of accountability of a believer to Allah (s.w.t.) for all his deeds and actions in the hereafter is further explained with reference to the following verse of the Quran, in a conversation between Luqman and his son, which means "O my son! If it be (anything) equal to the weight of a grain of mustard seed, and though it be in a rock, or in the heavens or on the earth, Allah will bring it forth. Verily, Allah is Subtle, Well-Aware."[34]

In relation to the burden of proving a civil action, any person who makes an allegation has the burden of proving that allegation. It is for the party who makes the allegation to prove his case and satisfy the court that his claim is well-founded, before the court grants him judgment on the claim. This is based on the teaching of the Prophet (s.a.w.), "Evidence (*Baiyyinah*) is on him who alleges; the oath on him who denies."[35] This *hadith* sets down the burden of proof. The quantum of proof in civil cases is the balance of probabilities. The term 'balance of probabilities' means 'if the evidence is such that the tribunal can say, 'We think it more probable than not', the burden is discharged, but, if the probabilities are equal, it is not.'[36]

The quantum of proof in criminal cases, *ceteri paribus* (all other things being equal or held constant), is certainty (*Al-Yaqin*) or beyond reasonable doubt. Prophet (s.a.w.) said, "Hold *hudud* in cases of doubt." Caliph Umar (r.a.) said, "In cases of doubt I would rather hold *hudud* in abeyance than execute them;" Muaz bin Jabal, Ibn Mas'ud and Aqaba bin A'amir were reported to have said, that "if a *hudud* is doubtful, it

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33 See Quran, *Al-Kahfi* (18): 49: "And the Book (of deeds) will be placed (before you) and thou wilt see the sinful in great terror because of what is (recorded) therein; they will say, 'Ah! Woe to us! What a book is this! It leaves out nothing small or great, but takes account thereof!' they will find all that they did, placed before them: and not one will thy Lord treat with injustice."

34 Quran, *Luqman* (31): 16.

35 Sunan Ibn Majah.

36 Per Lord Denning in *Miller v. Ministry of Pensions* [1947] 2 All ER 372, at 374.

should be set aside." Proof beyond a reasonable doubt does not mean proof beyond a shadow of doubt but rather it must carry a high degree of probability. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable,' then the case is proved beyond a reasonable doubt, but nothing short of that would suffice.[37]

Abu Daud and Al Dar al-Quitri reported that Abu Hurairah narrated that al-Aslami had appeared before the Prophet (s.a.w.) and confessed four times to a commission of *zina*. To confirm, Prophet (s.a.w.) enquired, "Did you engage in sexual intercourse with her?" Al-Aslami replied, "Yes". Prophet (s.a.w.) then asked, "Is it likened to the insertion of kohl liner into its holder; otherwise a dipper plunged into a well?" He answered, "Yes". Prophet (s.a.w.) continued, "Do you know what it means by *zina*?" He answered, "Yes. I had engaged in an unlawful sexual intercourse just like a duly married couple engaged in it lawfully." The following Islamic legal maxims reinforce the above proposition: 'Whatever fact established via certainty cannot be dispelled except by another certainty;' 'Certainty cannot be dispelled by doubt.' Hence an allegation of liability must be supported by evidence.

Having noted some of the salient features of the Syariah, it is worth noting that Islamic legal traditions were predominant in many Middle Eastern, North African, East European and Central Asian states. However, the Western civilisation in the 19th century had a greater impact upon Muslim society, which brought radical changes in the field of civil and commercial transaction. For example, during the regime of the Ottoman Empire, the Ottoman Commercial Code which was promulgated as early as 1850, was based on French law.[38] Since then, many Muslim states have adopted and applied laws that were not wholly in harmony with religious doctrines. The reason given

37 *Ibid.* See also *Saminathan & Ors v. Public Prosecutor* [1955] 1 LNS 138.

38 Norman Anderman, *Law Reform in the Muslim World,* (London: The Athlone Press, 1976), p. 86.

for secularisation of law was that it was essential to cater to the need and aspiration of present day society. It is only in Saudi Arabia where Syariah is seen to still remain formally supreme in all fields of law.[39] For example, the fundamental law of the *hijaz* promulgated by the late King Abd al-'Aziz Ibn Saud as seen in art. 6 provides that 'legislation in the Kingdom of the *Hijaz* shall always conform to the Book of God, the *Sunnah* of His Prophet and the conduct of the Prophet's Companions and pious followers.'[40] Alongside the Syariah, there are an increasing number of administrative regulations promulgated by the Government of Saudi Arabia which come in the form of royal decrees.[41]

More to the point, Yemen and Oman declared in their respective constitutions that the Syariah will be the source of all legislation.[42] There are also states which apply Islamic law partially in their legal system such as Nigeria, Pakistan and Malaysia, among others. In Malaysia, the Muslim population consists of slightly more than 53% and it is an established fact that while Islamic law is not the governing law, Islam being the official religion, it has been accepted as an Islamic country. Further, the Prime Minister, Tun Dr. Mahathir Mohamed, had stated that Malaysia is an Islamic country based on the accepted interpretation that Islam is its official religion.[43] Apart from the above, other countries have recognised Malaysia as a model Muslim state.

39 Saudi Arabia is governed by a monarchy that sees itself as protector of the holy places of Islam, as well as the ordained agent of its people's destiny. However, the Syariah functions as if it were the Constitution of the Kingdom. The bureaucracy acts directly as an instrument of king and the Council of Ministers which represents the general will of the people. The monarch does not legislate *per se*.

40 Quoted from JND Anderson, *Islamic Law in the Modern World* (Stevens and Sons Ltd, London, 1959), p. 83.

41 Royal decrees assume an increasingly important piece of legislation in Saudi Arabia. Its importance is to enable it to move quickly along the path of development, which includes human resources development.

42 The Constitution of Yemen 1991, art. 3; the Basic Law of Oman 1996, art. 2.

43 The Star, Wednesday, 18 September 2002, p. 2.

3.5 MIXED LEGAL SYSTEMS

It is essential to be mindful of the fact that states often develop a legal system which incorporates components from more than one major legal system. This kind of legal system is sometimes called as 'mixed legal system' or 'pluralistic system'. A mixed legal system may be a mixture of religious law and civil law, religious law and common law, civil law and common law or all of them. For instance, a mixture of religious law and civil law system is practised in Algeria, Egypt, Iraq, Kuwait, Lebanon, Morocco, Mauritania, Syria and Tunisia among others. A mixture of religious law and common law system is practised in Pakistan, India, Kenya, Nigeria, Uganda, and Malaysia among others. A mixture of civil law and common law system is practised in Botswana, Mauritius, Malta, Namibia, Philippines, Sri Lanka, Swaziland and Zimbabwe among others. A mixture of religious law, civil law and common law is practised in Israel, Jordan, Saudi Arabia, Somalia and Yemen.[44]

The table below provides a summary of the key features of the three major legal systems discussed above.

Features:	Common Law	Civil Law	Islamic Law
Source of law	Statutes and case law	Statutes/ legislation	Quran and *Sunnah* as the primary sources. The other sources of Syariah are the consensus of opinion (*Ijma*), judicial reasoning (*Qiyas*), *Istihsan* (derivation), *Istislah* (public interest), and sources as to customs and usage.

44 Esin Örücü, 'What is a Mixed Legal System: Exclusion or Expansion?' Electronic Journal of Comparative Law (2008) vol 12(1), 1.

Judges and lawyers	Judges act as impartial referees; lawyers responsible for presenting case	Judge dominates trials	Judge dominates trials, *syarie* lawyers responsible for presenting case. The duty of a *syarie* lawyer is to assist the judge in arriving at a just and fair decision even if it runs contrary to their client's interest and this is considered as a religious duty.
Judges' qualifications	Experienced lawyers are appointed	Career judges	Persons entrusted with its administration of justice must be competent according to the criteria laid down by Allah (s.w.t.).
Judicial independence	Judges are independent from the executive and the legislature	Judgesare independent from the executive and the legislature	Judges are independent. They are required to decide cases based on the divine laws.
Examples	Australia, UK (except Scotland), India, Ireland, Singapore, Hong Kong, USA (except Louisiana), Canada (except Québec), New Zealand, Pakistan, Malaysia and Bangladesh.	All European Union states (except UK, Ireland and Cyprus), all of continental Latin America (except Guyana and Belize),Québec, all of East Asia (except Hong Kong), Congo, Azerbaijan, Kuwait, Iraq, Russia, Turkey, Egypt, Madagascar, Lebanon, Switzerland, Indonesia, Vietnam and Thailand.	Many Muslim countries have adopted Syariah such as Saudi Arabia, Afghanistan, Iran, UAE, Oman, Sudan, Malaysia and Yemen.

3.6 ADVERSARIAL SYSTEM v. INQUISITORIAL SYSTEM

The two modes of trial commonly adopted in the contemporary legal systems are the adversarial and inquisitorial systems. The Malaysian courts adhere to the common law adversarial system while the inquisitorial system is common in the civil law countries. Under the adversarial system, the parties through their advocates who control their respective cases in the best manner as it appears to them and the court does not direct or dictate to them on how to conduct their cases.[45] In criminal cases, the police would conduct the investigation and submit the report to the Public Prosecutor who will then determine whether the suspect should be prosecuted. The trial is oral in nature, and the prosecution must establish a *prima facie* case before the accused can be called to enter his defence.

The trial judge merely presides at the hearing and takes a passive role in the presentation of the evidence.[46] The judge is expected only to listen and may ask questions for the purpose of seeking clarifications. He is not permitted to call witnesses except with the parties' consent. Further, the judge will ensure that the best evidence is adduced to prove a particular fact, to see that witnesses only give relevant facts and not their opinion unless it is an expert opinion. Where necessary, judges must be mindful of the need to have corroboration or caution when assessing whether the prosecution have proven their case. In *Jones v. National Coal Board*,[47] Lord Denning stated:

> The presiding judge only adjudicates on the pleadings and evidence produced by the parties. He acts as an impartial referee and may only "ask questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep the rules laid down by the law; to exclude irrelevancies and discourage repetition; to make sure that by

45 See *Syed Ibrahim Syed Mohd & Ors v. Esso Production Malaysia Incorporated* [2004] 1 CLJ 889.

46 See *Payremalu Veerappan v. Dr Amarjeet Kaur & Ors* [2001] 4 CLJ 380.

47 [1957] 2 QB 55 at 64.

> wise intervention he follows the points that the advocates are making and to assess their worth; and at the end to make up his mind where the truth lies."

Meanwhile, in the inquisitorial system, apart from the local police, the investigating judge is actively involved in the investigation and examination of all evidence in order to establish the facts of the case against the accused. The investigation by the police and the investigating judge is to collect evidence in order to determine whether a case against the accused has been established and ought to go for trial. The judge can question witnesses, interrogate suspects and order searches for further investigations. The court thus plays a dominant role in investigating the facts, forming an opinion whether the evidence was sufficient to justify charging the accused and to establish whether there is a '*prima facie*' case against the accused from the available records. When declaring the verdict, the judge must also release the reasoning for the verdict. Further, in this system, a plea of guilt is not common, for even if the accused has pleaded guilty, the judge may declare the accused not guilty if he believes that there is evidence to indicate that the accused is innocent.

The Islamic legal system on the other hand, adopts a combination of the adversarial and inquisitorial approach. As stated earlier, all the parties in a dispute are charged with the obligation of upholding justice absolutely. The disputing parties will be given full freedom to present their cases and set forth their points of view. Inquiries will then be conducted to investigate the circumstances leading to the commission of the offence or the civil wrong. The ultimate reliance for the decision of the case will depend on the presentation of the evidence.

In order to ascertain the truth, the judge must thoroughly elucidate the reality of the case in hand until a decision therein attains a reasonable degree of certainty.[48] From a report in Sunnan Abu Daud: Caliph Ali said to the effect: "The Prophet (s.a.w.) had sent me to Yemen as a judge.

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48 The Quran says, "O ye who believe, if a wicked person comes to you with any news, ascertain the truth, lest ye harm people unwittingly" (*Al-Hujarat* (49): 6).

I said to the Prophet (s.a.w.), 'O Prophet, why do you send me while I'm still young and ignorant on matters of the judiciary?' The Prophet (s.a.w.) said: 'Verily Allah will grant His guidance on your heart and will strengthen your tongue. If two men came arguing before you, do not give judgment until you have heard the argument of the second man as you have heard the argument of the first, this is more fitting for you so that the matter would be clear to you when you give your judgment." Caliph Ali said: 'Since then I have never had any doubts while giving judgment.' The above *hadith* is clear guidance for judges to be just while conducting a trial. A just decision can never be achieved unless clear proof and argument is presented or where the litigating parties are not given the proper opportunity to prove their facts and to defend their rights.

In another *hadith* Ummu Salamah said: "Two men came one day to the house of the Prophet (s.a.w.) claiming right to an estate, but they did not bring any proof for their claims. The Prophet (s.a.w.) then told them, 'You have come before me complaining of this dispute, while I am merely but a man, it may be that one of you is more convincing in presenting his case than the other, and I only decide on the matter in dispute based on the arguments that you have given. To the person that I have believed his evidence as a result of his cleverness in presenting it and I have given him something that is his brother's right, therefore I have given to him a piece of hellfire. He will place on his neck what has been decided for him as fuel for the fire in hell.' Upon hearing the Prophet (s.a.w.) saying such, both men cried and said, 'What is mine I now give to my brother.' After listening to this the Prophet (s.a.w.) said, 'Get up and go, divide the property equally among you then let there be kinship between you in the property and each of you should be willing (to share) with each other as friends.'" The above *hadith* is proof that a decision must be based on the evidence and submission of the litigants. Since both litigants had failed to adduce evidence supporting their claim, the Prophet (s.a.w.) therefore reminded them of the consequences of a wrong decision as a result of bad evidence. The advice and warning given had then led the litigants to solve the dispute by way of compromise.

Having said the above, it must be noted that in Malaysia the ordinary courts of law adhere to the adversarial approach while the proceedings in the Industrial Court is more inquisitorial in character. "It is only after the Industrial Court has investigated the facts, done an analysis of the facts and has come to a finding of facts that it will lastly apply the law to those findings."[49] Likewise, the inquisitorial approach is also used in a Coroner's Inquest. In *Re Anthony Chang Kim Fook*, Deceased,[50] it was stated: "in an inquest, there are no parties, there is no indictment, there is no prosecution, there is no defence and there is no trial. It is simply an attempt to establish facts. It is an inquisitorial process, a process of investigation quite unlike a trial where the prosecutor accuses and the accused defends, the judge holding the balance or the ring, whichever metaphor one chooses to use."

49 See *Hotel Malaya Sdn Bhd & Anor v. National Union of Hotel, Bar and Restaurant Workers & Anor* [1982] CLJ 460.

50 [2007] 2 CLJ 362.

The following table briefly outlines the important features of the adversarial and inquisitorial systems.

	ADVERSARIAL SYSTEMS	INQUISITORIAL SYSTEMS
Judicial Precedent	Previous decision of the superior court binds the counts below	Heavy reliance is placed on statutes/ codes of law. Each case is decided independently of previous decisions.
Investigation	The responsibility for gathering evidence rests with the police who will then forward the investigation report to the Public Prosecutor. The later will then decide whether to press charges. Further, the accused has a right to plead guilty and avoid a trial.	Investigations are carried out by the prosecutor or may request the police with appropriate instruction on how to conduct the investigation. Even a judge may carry out or oversee the investigative phase. Regardless of the accused's wishes or plea of guilt, the trial processes continues until the end.
Examining phase	No examination phase. Evidences gathered during investigation are evaluated at the trial.	There is an examination phase. The examining judge reviews evidence and decides whether the case should proceed to trial.
The trial process	Prosecutor acts on behalf of the State while the defence lawyer acts on behalf of the accused. Trial is conducted before an impartial adjudicator, a judge. Parties determine the witnesses they call and the nature of the evidence they wish to tender and it is subject to examination-in-chief, cross-examination and re-examination. The trial is the exclusive forum for determining the truth i.e., to determine whether the accused is guilty as per the charge. The court's role is confined to overseeing the process by which evidence	A record of evidence gathered at the examining phase is made available to the prosecution and defence well in advance of the trial. The conduct of the trial is largely in the hands of the court. At the trial, the case is presented to the trial judge and, in some cases, the jury, to allow the lawyers to present oral argument in public. The trial judge determines which witnesses to call and the order in which they are to be heard, and assumes the dominant role in questioning them. While there is no cross-examination and re-examination of witnesses, witnesses are still questioned and challenged. The offender's criminal history, for example, may be read to the court before the trial begins.

	is given and then weighing up that evidence to determine whether a case has been established beyond reasonable doubt (criminal case) or on a balance of probabilities (civil case). Further, evidence upon a matter must be given on oath.	
Role of the trial Judge and counsel	A judge is a referee at the hearing. It is the judge's function to ensure that the case is conducted in a manner that observes the rule of natural justice. The trial judge must confine himself to the evidence tendered at the trial and arrive at a specific verdict based only on the established facts. The judge will decide whether the accused is guilty beyond reasonable doubt, and thereafter determines the sentence. Meanwhile, lawyers are primarily responsible for introducing evidence and questioning witnesses.	Judges have an active position in the trial. They are required to direct the courtroom debate and to come to a final decision. The judge assumes the role of principal interrogator of witnesses and the defendant, and is under an obligation to evaluate all relevant evidence in reaching their decision. It is the judge who carries out most of the examination of witnesses. They lead the hearing and this includes establishing the facts of the case and applying the relevant provisions of the applicable statute to the case.
Rules of evidence	The rule around admissibility of evidence is strictly observed. Evidence which is prejudicial or of little probative value, is more likely to be inadmissible. For example, in Malaysia, the Evidence Act 1950, which applies to all judicial proceedings, determines the admissibility of the evidence in court. The admissibility of evidence is	The rules around admissibility of evidence are significantly more lenient. Evidence is likely to be admitted regardless of its reliability or prejudicial effect. The trial judge will decide to admit evidence if it is relevant. Hearsay evidence is more readily allowable if it is reliable.

	determined in terms of relevancy and proof; evidence produced in court is reliable; tendering of the best evidence; evidence is limited to the scope of material and relevant facts; and mode of production of evidence in court.	
Role of the victim	In criminal cases, victims are not a party to proceedings. Prosecutor act on behalf of the state to prosecute the perpetrator and do not represent the victim.	The victim generally has a more recognised role in inquisitorial systems. They usually have the status of a party to proceedings.
Organisation of courts	There are courts of general jurisdiction which are able to adjudicate a wide range of cases.	Civil law systems tend to have specialist courts (and specialist appeal courts) to deal with constitutional law, criminal law, administrative law, commercial law, and civil or private law.